No. 15,149

United States Court of Appeals

For the Ninth Circuit

WIEN ALASKA AIRLINES, INC.,
Appellant,

vs.

SAMUEL SIMMONDS, Administrator of the Estate of Martha Simmonds, Deceased, for the benefit of Samuel Simmonds, and the children of the deceased, namely, Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds,
Appellee.

BRIEF OF APPELLANT.

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Appellee.

BRIEF OF APPELLANT.

Appellant, the defendant below, is seeking by this appeal review of a final judgment entered by the District Court for the Territory of Alaska on December 22, 1955, based upon a jury verdict of $11,500.00 in favor of appellee for a death in an airline crash.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska is a Court of general jurisdiction (A.C.L.A. 1949, 53-1-1)

in civil, criminal, equity and admiralty cases. The United States Court of Appeals (Ninth Circuit) has appellate jurisdiction to review by appeal the final decisions of the District Court for the District of Alaska. (28 U.S.C. 1291, 1294.)

STATEMENT OF CASE.

Martha Simmonds died on October 10, 1951 in the crash of a single-engine aircraft, operated by appellant on a non-scheduled bush flight from Umiat (stopping at Meade River for her and her child) to Barrow, Alaska. The crash occurred a few miles southwest of Barrow. The pilot also died in the crash; and the sole survivor of the crash was the infant child of Martha Simmonds, unharmed, likely by reason of being cradled on the back of, and in the parka hood of the mother, a custom common to the Eskimo people. The crash was discovered in a matter of minutes, and a rescue team arrived probably within a half hour after the crash.

Martha Simmonds left surviving, her husband, Samuel, and six minor children: Leona, Nellie, Doreen, Eli, Margaret, and Arnold, the survivor of the crash. All reside at Barrow, Alaska. Samuel Simmonds became the administrator of the estate of Martha by appointment of the Probate Court in the Point Barrow Precinct; and on May 21, 1953 commenced this action.

The Issue.

This action is based on Chapter 89, Session Laws of Alaska for 1949, reading as follows:

"AN ACT

To increase the amount of damages in actions for wrongful death, and amending Sec. 61-7-3 ACLA 1949.

Be it enacted by the Legislature of the Territory of Alaska.

Section 1. Sec. 61-7-3 ACLA 1949 is hereby amended to read as follows:

Sec. 61-7-3. ACTION FOR WRONGFUL DEATH: DISPOSITION OF AMOUNT RECOVERED. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefore against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed *fifteen thousand dollars,* and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife, or children, him or her surviving; and when any sum is collected it must be distributed by the Plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration, and when he or she leaves no husband, wife or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person;

but the plaintiff may deduct therefrom the expenses of the action, to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper. Approved March 23, 1949." (Emphasis supplied.)

The act amended by Chapter 89 was adopted by Congress for Alaska in 1900. (See: 31 Stat. 391, 393. Carter Code, Sec. 353; Charlton Code, Sec. 353, Sec. 1185 CLA (1913), Sec. 3845 CLA (1933), Sec. 61-7-3, ACLA (1949).) No change was made in the act until 1949, (supra) and the only change made by Chapter 89, above, was to raise the recovery limit from $10,000.00 to $15,000.00. The law above noted was radically changed by the Legislature for Alaska in 1953 (See: Appendix A), a point of interest in interpreting the 1949 Act.

The plaintiff's case, by the pleadings, evidence and instructions, is founded entirely on the theory that the 1949 act (supra) created a separate cause of action vested in the surviving spouse and children, prosecuted by the administrator of the decedent's estate only as a nominal party plaintiff, and under which the measure of damages is the total of the pecuniary loss individually suffered by each beneficiary as a direct result of the untimely death.

The position of the appellant is that the 1949 act creates but *one* cause of action, vested in the administrator of the estate, for the recovery of the *loss to the estate* by reason of the untimely death; and that the manner of distribution is not material to the

measure of damages, the measure being that additional estate which might reasonably have been accumulated by decedent but for her untimely death.

The Manner in Which the Issue Was Raised.

The Pleadings.

The following appears from the original complaint. (Tr. pp. 3 to 6):

1. In the caption plaintiff does not sue "*as*" administrator; he merely identifies himself, and sue "for the benefit of * * *" the surviving spouse and children.

2. The pleading spells out survivorship in paragraph VI (Tr. p. 4).

3. In paragraph VII of the complaint there is alleged:

> "That *all the plaintiff's* have been totally deprived of the affection, society, companionship, and comfort of the said deceased as wife and mother and have been deprived of her care, service and comfort." (Tr. p. 5.)

4. In paragraph VIII it is alleged:

> "Plaintiff states that by reason of the loss and companionship of said wife * * * that he has been damaged in the sum of Five Thousand ($5,000.00) Dollars." (Tr. p. 5.)

5. In paragraph IX it is alleged:

> "* * * the children * * * have been deprived of the companionship and motherly care and supervision of the said intestate, and plaintiff is

thereby damaged in the further sum of Ten Thousand ($10,000.00) Dollars * * *"

6. The complaint is consistent with the foregoing pattern, and fails to allege an action *by* the administrator for the *loss to the estate* measured by the probable savings that might have accrued but for the untimely death.

The issue was raised by appellant's motion to dismiss, and to strike the offending portions of the pleading above noted (Tr. pp. 7, 8). The denial of these motions is claimed as error. (See Tr. pp. 8, 9 for Order, pp. 32, 33 for Points on Appeal.)

Subsequently an amended complaint was filed voluntarily in which the pleader eliminated the objectionable language in paragraph VII (see 3 above), and combined the damage statements into the following allegation (Tr. p. 11):

"VIII

That the said Martha Simmonds left surviving, her widower, Samuel Simmonds, the plaintiff herein, and those children named in paragraph VI thereof, each of whom are still living and by the death of said Martha Simmonds, as aforesaid, they were damaged in the sum of Fifteen Thousand ($15,000.00) Dollars."

Plaintiff's theory in the amended complaint not having been changed, and the Court already ruled thereon, appellant answered.

The Evidence.

Plaintiff's evidence was pertinent to counsel's theory of the case; and objections consistent with defendant's position were made, and by the Court overruled. There being no real purpose in reproducing the record for this appeal other than to establish a consistent legal position, counsel have covered the matter by stipulation. (See: Tr. p. 31.)

Appellant made a motion to dismiss at the close of plaintiff's case, (Tr. pp. 34 to 38) which was by the Court denied, which ruling is now claimed as error. (Tr. p. 33 Points on Appeal.)

Instructions.

Appellant requested that the Court give the following instruction (Defendant's Requested Instruction No. 1) (Tr. p. 20):

> "If you find for the plaintiff and against the defendant in this action, you must then determine the amount of damages which you believe the plaintiff is entitled to recover from the defendant. The true measure of damages in such event is the *pecuniary loss suffered by the estate.* Such loss would be what the deceased would probably have earned by her intellectual or bodily effort of labor in her business or profession during the remainder of her life, which, to the extent of her net savings would have gone for the benefit of her estate. In determining this amount, you should consider her age, ability, disposition to labor, and habits of living and expenditures and disposition to save. If the husband of the deceased paid the expenses of her last illness and funeral expense, or has

obligated himself to pay them, you shall take this into consideration in determining amount of damages allowable.

You may not consider as an element of damages, the grief or anguish of the surviving relatives, including her husband and children, or the loss to the widower and children of the love and affection of the wife and mother and loss of the consolation of her presence in the family, or the pain and suffering of the deceased.

The amount of damages which you may allow, must not exceed the sum of $15,000.00." (Emphasis supplied.)

which was supported by citations and certified copies of instructions from *Draille v. Steele, No. A-7101, Third Division, District Court for Alaska;* and is set out complete as submitted in Appendix No. B. The Court refused to give the instruction requested, a ruling now claimed as error. (Tr. p. 32 Points on Appeal.)

The Court gave instructions numbered 3, 14, 15, 17, 18, objected to by Appellant (Tr. pp. 38, 39), and set out in full in Appendix C (See also Tr. pp. 21-25), all consistent with plaintiff's theory, and well exemplified by instructions 14 and 15 as follows:

"14. If under the court's instructions you find that plaintiff is entitled to a verdict, you will award such sum as, under all the circumstances of the case, *compensates the surviving husband and children of Martha Simmonds for the pecuniary loss they have suffered by reason of her death;*

provided, however, you may not return a verdict for plaintiff in excess of $15,000.00.

15. In determining that pecuniary loss, you may consider not only the financial support, if any, which the decedent's husband and children would have received except for her death but also the pecuniary value of the society, comfort, care, protection and right to receive support, if any, which decedent's husband and children have lost by reason of the death. In weighing these matters you may consider the age of the decedent, and of decedent's husband and children; the state of health and physical condition of decedent and of decedent's husband and children as it existed at the time of the death and immediately prior thereto; their station in life; their respective expectancies of life as shown by the evidence; the disposition of the decedent, whether it was kindly, affectionate or otherwise; whether or not she showed an inclination to contribute to the support of her husband and children, or any of them; the earning capacity of the decedent and of her husband and children, and such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, comfort and protection, which decedent's husband and children might have expected to receive from the decedent had she lived. With respect to the matter of life expectancies, you must keep this point in mind: If you decide for plaintiff, the prospective periods of time that will be of concern to you in determining the pecuniary loss of each beneficiary is only the shorter of the life expectancies of the decedent and that beneficiary, because manifestly one could derive pecuniary benefit from

the life of the other only for the period that both would have lived." (Emphasis supplied.)

The grounds for urging our requested instruction, and for objecting to the given instructions, was stated to the Court thoroughly by pre-trial brief (the trial judge not being the judge that settled the pleadings), and recognized by the Court in its pre-trial opinion (See: Tr. pp. 15 to 19.) The grounds were identical with those urged on this appeal.

SPECIFICATION OF ERROR.

The District Court erred in holding that the Alaska Wrongful Death Statute (Chapter 89, SLA 1949, supra) permits recovery by the widower and minor children of their personal pecuniary loss, including the pecuniary value of society, comfort, care, protection and support, committing the same error in connection with each item noted in the appellant's points on appeal (Tr. pp. 32, 33.)

ARGUMENT.

SUMMARY.

The positions of appellant with reference to the points on appeal are these:

I. This Circuit by its decisions in the cases of *Jennings v. Alaska Treadwell Gold Mining Company* (CCA 9th 1909) 170 Fed. 146, 3 Alaska Fed. 350 and *The Princess Sophia* (CCA 9th

1932), 61 Fed. 2d 339 has established that the action created by the Alaska Wrongful Death Statute belongs to the administrator of the estate, irrespective of the survival of a spouse and/or children, and that the measure of damages is the loss to the estate.

II. The courts have uniformly applied the "loss to the estate" rule of damages under the Alaska Wrongful Death Statute in all cases, including those in which a spouse and/or children survived.

III. The re-enactment of the Wrongful Death Act, by the Legislature of Alaska in 1949 (Chapter 89), providing as its only change a raise in the recovery limit from $10,000.00 to $15,000.00, constitutes a legislative ratification of judicial interpretation then existing and is thereafter binding on the Courts.

I.

THIS COURT, BY ITS DECISIONS IN THE CASES JENNINGS v. ALASKA TREADWELL GOLD MINING CO. AND THE PRINCESS SOPHIA (SUPRA) HAS ESTABLISHED THAT THE ACTION CREATED BY THE ALASKA WRONGFUL DEATH STATUTE BELONGS TO THE ADMINISTRATOR OF THE ESTATE, IRRESPECTIVE OF THE SURVIVAL OF A SPOUSE AND/OR CHILDREN, AND THAT THE MEASURE OF DAMAGES IS THE LOSS TO THE ESTATE.

In an accident in the mine of the Alaska Treadwell Gold Mining Company located near Juneau, Alaska, two men were fatally injured. One of the men was named Linge. Two attorneys, R. W. Jennings and Z. R. Cheney sought administration of the estates,

Mr. Cheney becoming the administrator of the Linge estate, and Mr. Jennings the administrator of the other decedent. They each filed actions, as administrators, against the company; and each joined as counsel in each action. The first action tried is reported as *Linge's Administrator v. Alaska Treadwell Gold Mining Co.* (1st Div., 1906) 3 Alaska 9. The case was first appealed to this Court on a probate point reported as *Cheney v. Alaska Treadwell Gold Mining Co.* (CCA 9th, 1906) 148 Fed. 808, 2 Alaska Fed. 641; and upon retrial (unreported) again appealed to this Court on the point of liability (*Alaska Treadwell Gold Mining Company v. Cheney* (CCA 9th, 1908) 162 Fed. 593; 3 Alaska Fed. 142). Following the last appeal counsel brought on the second case, in which Mr. Jennings was administrator. No Alaska Court opinion is reported thereon; however, an appeal was taken because of an instructed verdict in favor of the defendant based upon a failure of proof that *anyone* suffered a pecuniary loss by reason of the death. *Jennings v. Alaska Treadwell Gold Mining Co.* (9th Cir. 1909) 170 Fed. 146, 3 Alaska Fed. 350.

The point on appeal is limited to the single question of damage. This Court in its opinion, after setting out the Alaska Statute, says, (p. 148):

> "The Alaska Code of Civil Procedure is substantially the same as the Oregon Code of Civil Procedure, and Section 353 of the Alaska Code is identical with Section 381 of the Oregon Code (B. & C. Comp.), with the following exceptions: In the Alaska Code the amount that may be recovered 'shall not exceed ten thousand dollars'; while in

the Oregon Code, the amount that may be recovered shall not exceed five thousand dollars. In the Oregon Code it is provided that: 'The amount recovered, if any, shall be administered as other personal property of the deceased person.'

In the Alaska Code there is a provision that: 'The amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife or children, when he or she leaves a husband, wife or children, him or her surviving.'

But that provision has no bearing on this case, as the deceased left no surviving wife or children. The next provision in the Alaska Code is: 'When he or she leaves no husband, wife or children, him or her surviving'—that in this case—'the amount recovered shall be administered as other personal property of the deceased person.'

This last provision, it will be observed, is identical with the Oregon Code.

In 1898, two years before the adoption of the Alaska Code by Congress, the section of the Oregon Code under consideration was brought before the Supreme Court of that state in the case of Perham v. Portland Electric Co., 33 Or. 451, 53 P. 14, 24, 40 L.R.A. 799, 72 Am. St. Rep. 730. In an elaborate opinion upon this statute the Court refers to the construction placed upon the original Lord Campbell act passed by the British Parliament in 1846, the incorporation of this act in one form or another into the legislation of most of the states of the union, and the construction placed upon such statutes by the courts of the states. With respect to the beneficiaries under the Oregon act and the damages that may be recovered, the court said:

'It is next claimed that the complaint is defective because it does not show that the deceased left surviving him any heirs, legatees, next of kin, or creditors. * * *

Under Lord Campbell's act and similar statutes, the damages recovered belong to the designated beneficiary, and are measured by the value of the life taken to the particular person entitled to the benefit of the statute; while under our statute they belong to the estate, and are coextensive with the value of the life lost, without regard to its value to any particular person. In the one case the object of the action is to recover the pecuniary loss sustained by the designated relatives, and in the other the value of the life lost, measured, as near as can be, by the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life.'

The court continues: 'It follows, therefore, that, so far as the right to maintain the action is concerned, it is immaterial whether the deceased left surviving him any relatives or creditors whatever. The right of action is given by the statute to the administrator or executor in his representative capacity, and is in the nature of an asset of the estate. The heirs, creditors, or distributees have no interest in the recovery on account of any right of action for the pecuniary injury sustained by them, but only by virtue of being creditors, or of kinship; and if the expense of the administration and debts of the deceased equal or exceed the assets, including the amount of the recovery, the next of kin would receive no benefit whatever from the right of action.' * * *

> It is true that the two statutes are not identical as a whole but the change in the Alaska Code from the Oregon Code makes more definite and certain the purpose of Congress to adopt the construction of the Supreme Court of Oregon for estates where the decedent left no husband, wife, or children. In such case the amount recovered should be administered as other personal property of the deceased person as provided in the Oregon Statute; that is to say, the amount received should be for the benefit of the estate, and the damage to the estate would therefore be the value of the life to the estate, measured by the earning capacity, thriftiness, and probable length of life of the deceased."

At this point, in considering the opinion, it should be noted that in both the *Cheney* case (supra) and the *Jennings* case (supra) the decedents were single men. The Court has said, above, relating to the statutory provision for distribution to the spouse and/or children (p. 148):

> "But that provision has no bearing on this case as the decedent left no surviving wife or children."

If the Court had gone no further that opinion might not be binding on this appeal. But the Court set out an objection to testimony as to family (p. 150), then noted that the trial Court's theory was "the benefit to the estate rule", then considered as error (laying aside inconsistency) the Courts having ruled a failure of proof for want of a showing that any person suffered loss by the death (p. 150). The Court considered the

District of Columbia act, whereunder the action is to be "brought *in the name* of the administrator * * * and the damages recovered (shall) inure to the benefit of his or her family * * *; and the Maryland act whereunder "* * * such action shall be for the benefit of the husband, wife, parent and child * * * and shall be brought by and *in the name of the State of Maryland* * * *" (Opinion of *Stewart v. B. & O. Railroad,* 168 US 445, cited in the *Jennings* case). In this connection this Court said (p. 151):

> "* * * But the two statutes differ very materially from the Alaska statute. In the former the amount recovered as damages does not become part of the assets of the estate, *while in the Alaska Code it does, and is administered as other personal property of the deceased person.*
>
> We are of the opinion that the construction placed upon the statutes of Maryland and the District of Columbia by the Supreme Court is not applicable to the Alaska statute under consideration. Following the construction placed upon the Oregon statute by the Supreme Court of Oregon, we are of the opinion that the case should have been submitted to the jury with proper instructions upon the evidence as to the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life."

Clearly here this Court has examined the Alaska act *as a whole.* The Maryland and District of Columbia acts are not only for the benefit of a named class, *but provide no right of recovery where persons of the named class do not survive.* (This also is the present

Alaska Act, see: Appendix A.) The Court determined that the Alaska Act creates *but one right or cause,* and that is for the benefit of the estate irrespective of survivorship; saying specially of the Alaska Act that the amount recovered as damages does become a part of the estate.

Judge Neterer of the Western District of Washington, Northern Division, in considering the exceptions to the rulings of the Commissioner, and in commenting on the rulings of the Commissioner, in *The Princess Sophia* (1929) 35 Fed. 2d 736, said of the Alaska Statute (at 738):

> "This statute was construed by the Court of Appeals of this circuit in Jennings v. Alaska Treadwell Gold Mining Co., 170 F. 146, 148, and adopted the construction of the Oregon Supreme Court in Perham v. Portland Electric Co., 33 Or. 451, 53 P. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730. Judge Morrow said, in considering the measure of damages: 'The Alaska Code of Civil Procedure is substantially the same as the Oregon Code * * * and section 353 (now 1185) of the Alaska Code is identical with section 381 of the Oregon Code * * * with the following exceptions: In the Alaska Code the amount that may be recovered 'shall not exceed $10,000.00', while in the Oregon Code the amount that may be recovered 'shall not exceed $5,000.00.' "
>
> And states the rule: 'In such case the amount recovered should be administered as other personal property of the deceased person as provided in the Oregon statute; that is to say, the amount received should be for the benefit of the estate and the damage to the estate would therefore be the

value of the life to the estate, measured by the earning capacity, thriftiness, and probable length of the life of the deceased.' "

The Court then goes on to illustrate (p. 738):

"There is a distinction in the nature and measure of damages to the injured person, or right given to the surviving spouse of dependents, or a statutory right for the benefit of the estate * * * In the second, loss to the beneficiary, which would include loss to the named person by way of contribution, support, including elements which may not be approximated in money, such as love and affection, aside from the financial loss; third, to the estate, where it is made as nearly as may be to the financial returns which could reasonably be expected, what investments or savings have been effected during the lifetime, the reasonable expectancy or certainty of continued savings, and, giving consideration to his age, health, habits, disposition, and capacity to labor and to save, what would he likely have provided for an estate had he lived the life expectancy. See Holmes v. O. & C. Ry. Co., supra; Kelley v. Cent. R. R. of Iowa (C.C.) 48 F. 663; In re California Nav. & Imp. Co. (D. C.) 110 F. 670."

With this fundamental concept of the statute in mind, *from the construction thereof by this Court in the Jennings case,* Judge Neterer goes on to dispose of particular points, one of which was exceptions to the claims of heirs, to which is said (p. 740):

"(5, 6) The exceptions to the claims of heirs allowed by the Commissioner must be sustained (see (3) in margin). The right of recovery is

given to the personal representatives of the estate by the statute. No common-law right of action to the heirs is available. The right of action, being given to the administrator or executor in his representative capacity, *is in the nature of an asset of the estate. Heirs have no interest in the recovery on account of any right of action for pecuniary injury sustained by them.* Perham v. Portland Gen. Electric Co., 33 Or. 451, 53 P. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730. To the same effect is Carlson v. Oregon Short Line, 21 Or. 450, 28 P. 497; see, also Jennings v. Alaska Treadwell Gold Mining Co. (C.C.A.) 170 F. 146." (Emphasis supplied.)

And, in relation to the findings on damages, the Court said (p. 740)

"What has been said with relation to the rule of recovery forces the conclusion that under the Alaska statute *increased costs of living to the widow,* Browne v. Great Lakes Transit Corp'n (C.C.A.) 5 F. (2d) 58, comfort, love, consolation, and affection to the bereft, the financial responsibility of the petitioner, equal distribution of justice, or dictates of humanity would not warrant the court in finding a pecuniary loss where none is shown by the evidence. The court could not in good conscience say that a party 35, 40, 50, or 60 years of age, or any age, who has not shown some result of saving and saving habit and position of expectancy, in all reasonable probability, would leave an estate of present worth at the end of life expectancy. Health, earning capacity, and employment, contributions to charity, or 'living well', being a 'good fellow', without some evidence of accumulation and saving habit does not

create a presumption of itself to support such finding." (Emphasis added.)

The commissioner's report is not available for study; however, it would be a safe assumption that among the claims filed and allowed relating to the loss of about 350 lives in this terrible disaster must have been many by administrators where a spouse and/or children survived. And there appears to be no question but that the proceeding was bitterly contested at each step by competent counsel. Indeed, the comment by Judge Neterer on the distinction between the "loss to the beneficiary" rule and the "loss to the estate" rule leaves no doubt but that not only were there claims in which a spouse or child survived, but that also counsel raised particularly the applicable rule with respect thereto.

This Court reviewed the opinion of Judge Neterer, as well as an extremely voluminous record, in close detail as appears from this Court's opinion, (*The Princess Sophia* (C.C.A. 9th (1932) 61 Fed. 2d 339.) The Court discussed all of the errors, except one, even though it felt to do so unnecessary in view of the holding on "limitations of liability". All of the District Court's rulings on the interpretation of the Alaska Wrongful Death Statute were sustained. This Court on page 354 states:

> "(28) The one assignment of error not passed upon is the one relating to the holding and finding of court *that the evidence was not sufficient to sustain the commissioner's findings,* and award of damages in favor of a hundred or more

> claimants in the amounts set forth in the commissioner's reports. The court held that the *evidence* did not *prove* any *pecuniary loss to any of the estates suing,* and consequently, under the Alaska Statute noted in the margin no recovery was allowable." (Emphasis supplied.)

The Court laid aside this error as "moot" in view of the practical nonexistence of a fund out of which to pay the claims. The very detail with which the Court considered *all* of the other issues in the case is so impressive that one is forced to the conclusion that this Court is in full accord with the *principles* upon which it was ruled the evidence did not show a pecuniary loss to the estates (even though at least in one a widow survived as appears from Judge Neterer's opinion), and by the foregoing statement intended to pass only the *task* of examining the *evidence* in the record relating to the hundred or more claims wherein the *sufficiency of the evidence* to support the ruling was claimed as error.

The ruling of this Court in *The Princess Sophia* has been looked upon as a ratification of the *Jennings* case; and those cases as establishing that the Alaska Wrongful Death Statute creates only one cause of action: a right of the administrator to recover for the estate the loss to the estate in accumulation of savings lost by the death, all apart from any consideration of survival by a spouse or children, or any pecuniary loss to dependents or family.

II.

THE COURTS HAVE UNIFORMLY APPLIED THE "LOSS TO THE ESTATE" RULE OF DAMAGES UNDER THE ALASKA WRONGFUL DEATH STATUTE, IN ALL CASES, INCLUDING THOSE IN WHICH A SPOUSE AND/OR CHILDREN SURVIVED.

In addition to the Circuit Court holdings in *Jennings v. Alaska Treadwell Gold Mining Co.* and *The Princess Sophia* (supra) the Courts in Alaska have commented on the Wrongful Death Statute in the following cases in which opinions have been written:

Linge's Administrator v. Alaska Treadwell Gold Mining Co. (1st Div. 1906) 3 Alaska 9;

Caswell v. Copper River and N. W. Ry. (3rd Div. 1913) 4 Alaska 709;

Kriedler v. Ketchikan Spruce Mills (1st Div. 1943) 10 Alaska 365.

An interesting thing about the *Linge's Administrator* case, supra, is that it went to the Ninth Circuit twice, as is apparent from the opinion of the Ninth Circuit in *Alaska Treadwell Gold Mining Co. v. Cheney* (1908) 162 Fed. 593, 3 Alaska Fed. 142, in connection with which the second appeal opened the suit for review of its merits. A close examination of the opinion of the Ninth Circuit shows that the ruling of the Court below with respect to the measure of damages (as no doubt exemplified in the instructions given) was not claimed as error.

The case of *Caswell v. Copper River and N. W. Ry.* (supra) did not involve children or a spouse. The Court was considering a motion directed to the plead-

ings. Pertinent thereto, and to the point in this case, is the Court's statement on page 712:

> "As to the ground set up in the third paragraph of defendant's motion to make more definite and certain, in that the plaintiff be required to state the number of remittances made by deceased to his mother, and what amounts were so remitted, and in what way or manner the said mother was largely dependent on deceased for support, it would seem that the allegations of the complaint with respect to such matters are immaterial, in view of the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Jennings v. Alaska Treadwell Gold Mining Co. 170 Fed. 146, 95 C.C.A. 388, in which the court quotes with approval the following language from the case of Perham v. Portland Electric Co., 33 Or. 451, 53 Pac. 14, 24, 40 L.R.A. 799, 72 Am. St. Rep. 730 as follows:
>
> 'It follows, therefore, that, so far as the right to maintain the action is concerned, it is immaterial whether the deceased left surviving him any relatives or creditors whatever. The right of action is given by the statute to the administrator or executor in his representative capacity, and is in the nature of an asset of the estate. The heirs, creditors, or distributees have no interest in the recovery on account of any right of action for the pecuniary injury sustained by them, but only by virtue of being creditors, or of kinship; and if the expense of the administration and debts of the deceased equal or exceed the assets, including the amount of the recovery, the next of kin would receive no benefit whatever from the right of action.' "

In the case of *Kriedler v. Ketchikan Spruce Mills* (1st Division 1943), supra, the Alaska Court again considers damage in wrongful death cases, and the Court at page 367 said:

> "This section of our statute was taken from the Oregon Code, and the measure of damages laid down by the Oregon Supreme Court in the early case of Carlson v. Oregon Short Line & U. N. Ry. Co., 21 Or. 450, 28 P. 497, is still followed:
>
> (1) In actions brought under this section, the true measure of damages, as stated in that case 'is the pecuniary loss suffered by the estate, without any solatium for the grief and anguish of surviving relatives or pain or suffering of the deceased; and that loss would be what the deceased would have probably *earned* by his *intellectual* or *bodily* labor in his *business* or *profession* during the residue of his life, and which, as representing his net savings, would have gone for the benefit of his estate, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditures. Carlson v. Oregon S. L. & U. N. Ry. Co., 21 Or. 450, 28 P. 497, 499, Gabrielson v. Dixon, 133 Or. 567, 291 P. 494, 495."

The main point in the *Kriedler* case was the Court's concern with fixing the amount of the loss under the evidence before it, it being contended on the one hand that the award should be "nominal", considering the decedent's age and very modest savings. The Court, however, found the decedent frugal, busy, just escaping a long national depression, just emerging into an area of higher wages, *and a man who had raised a fam-*

ily, and accordingly felt that in view of all the facts, he would likely have saved $1,600.00 in the rest of his life.

The opinion in the *Kriedler* case clearly shows that children survived; and no distinction was made by the Court in the rule on account thereof.

There is reported a ruling of Judge Diamond in *Draille v. Steele* (3rd Div. 1952) 13 Alaska 680, a case involving a surviving spouse and child, in which the pleader adopted the same theory as Appellee in this case. Judge Diamond in the written opinion overruled motions addressed to the pleading; however, as is evident from the instructions given (Appendix B) Judge Diamond reversed that ruling at the trial. The case was retried, the verdict having been set aside on another point, and Judge McCarey therein followed the instructions used by Judge Diamond. (Appendix B).

Accordingly, all of the Courts have consistently followed the rule of the *Jennings* case (supra) construing our statute as creating but *one* cause of action: a right in the administrator to recover the loss to the estate, unaffected by any loss to survivors.

III.

THE RE-ENACTMENT OF THE WRONGFUL DEATH ACT, BY THE LEGISLATURE OF ALASKA IN 1949 (CHAPTER 89), PROVIDING AS ITS ONLY CHANGE A RAISE IN THE RECOVERY LIMIT FROM $10,000.00 TO $15,000.00 CONSTITUTES A LEGISLATIVE RATIFICATION OF JUDICIAL INTERPRETATION THEN EXISTING AND IS THEREAFTER BINDING ON THE COURTS.

The Court in the *Jennings* case said (p. 149):

> "A statute adopted from another state, which has been construed by the highest court thereof is presumed to be adopted with the construction thus placed upon it. * * * (quoting cases)."

This principle rests on the reasoning that the legislature knew of the construction thereof by the Courts, and intended to adopt the construction as well as the language of the act.

When an act of the legislature is re-enacted, without change of the part in point, the same rule of intention, with the force of a presumption, is applied thereto with respect to prior judicial opinion.

Shapiro v. United States, 335 U.S. 1, 68 Sup. Ct. 1375, 92 L. Ed. 1787;

Lindeman v. State Indust. Accid. Com., 183 Ore. 245, 192 P. (2d) 732;

Overland v. Jackson, 128 Ore. 455, 275 P. 21.

The legislature must be deemed to have so considered its 1949 act, for in re-enacting the statute in 1953 (See Appendix A) it not only changed the language completely by making the action for the benefit of

named persons, *but limited action to those in which persons of the named class survived,* and specifically spelled out the elements of damage. Such carefully spelled out changes in such specific language is only consistent with a Legislative intent to create a marked change in what it understood the old act to be.

The "highest" Court in the Territory, and a branch of government on equal footing with the Legislature of the Territory is our District Court. Even though this be a trial Court, and its judgments subject to review by this Circuit Court, nonetheless the decisions of the District Court by the force of circumstances in a Territory should be presumed to be within the knowledge of the Legislature. In this light the *Kriedler* case (supra) becomes a foundation stone for the interpretation of the 1949 act.

In this instance we have an Act of Congress passed in 1900, not only interpreted by this Court in the *Jennings* case, and *The Princess Sophia* (supra), but by the District Courts in Alaska, notably in the *Kriedler* case (supra) in its 53 years of unchanged wording. During this period there can be no question but that the statute has been considered often by counsel, and by the trial Courts in death cases. In all these there is no intimation that the act was ever viewed as creating anything other than a right to recover for the loss to the estate by the Courts.

When the legislature in 1949 re-enacted this law they must therefore have intended to ratify the rule

of recovery measured by the loss to the estate. The generally understood meaning of the act, for such a great number of years, without intimation of dissent, by the people of Alaska, no doubt influenced the 1949 legislature in its consideration of changes in the act.

The first intimation of contrary thought by counsel is in the *Draille* case (supra). From Judge Diamond's opinion it is clear the point raised was fully and sympathetically considered, and by a well loved humanitarian gentleman. This Court cannot but doubt that Judge Diamond did not easily change his mind. The only thing that could have caused this eminent legal scholar to reverse his ruling is a well founded conclusion that the matter had been settled by this Court in the *Jennings* and *Princess Sophia* cases. No doubt also Judge Diamond's years in Congress lead him to respect the effect of the re-enactment of this act by our legislature in 1949, in the light of this Court's decisions, and the *Kriedler* case.

In 1953, the Alaska Legislature radically changed the Act (See Appendix A). The Alaska Legislature keeps no minutes of its committee proceedings, or any transcript of its legislative sessions; and so we have no reference material from which to determine precisely the legislative thought in either 1949 or 1953. But the sweeping changes in the 1953 Act speak for themselves.

The legislature in 1953 limited the death action sharply to those cases where spouse, children, grand-

children or parent survive. It cut out completely the estates of those who die surviving their parents and single. Perhaps this is a social recognition that the hardy, free roving, tie-less band of "Pioneers" so well remembered in Alaska are becoming extinct. And that the "savings", by limiting recoveries to those normally dependent upon the decedent, justified, in a small measure, the unequivocal mandate that recovery thereafter be measured by the loss to the named beneficiary. Indeed it is rare that statutes be so precise, as is the 1953 Act, to the point of a virtual draft of instructions to the jury.

While the 1953 Act is not in all respects clear, and may well require judicial interpretation, nonetheless its distinctly different character from the prior Acts evidence a knowledge by the legislature in 1949 that it was perpetuating a "loss to the estate" type of statute.

CONCLUSION.

The interpretation of the Alaska Wrongful Death Statute in the instant cause has been settled by this Court's decision; and the more than 55 years understanding thereof by the bench and bar, ratified by the legislative re-enactment of 1949. This cause should be reversed and remanded for trial in accordance with

the law as expressed in Defendant's Requested Instruction No. 1.

Respectfully submitted,

CHARLES J. CLASBY,
Attorney for Appellant.

COLLINS, CLASBY & SCZUDLO,
Of Counsel.

Service acknowledged by receipt of a copy this 11 day of September, 1956.

ROBERT A. PARRISH,
Attorney for Appellee.

(Appendices A, B and C Follow.)

Appendices.

Appendix A

"CHAPTER 153

AN ACT

Relating to damages in actions for wrongful death; amending Sec. 61-7-3, ACLA, 1949, as amended by Ch. 89, SLA, 1949.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Section 61-7-3 ACLA 1949, as amended by Chapter 89, Session Laws of Alaska, 1949, is hereby amended to read as follows:

Sec. 61-7-3. *Action for Wrongful Death: Disposition of Amount Recovered.* When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed fifty thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife or children, him or her surviving; or leaving no husband, wife or children surviving them and in that event, for the benefit per capita of the child or children of the decedent's child or children, if any, and the surviving parent or parents of the decedent. When the Plaintiff prevails, the trial court shall

determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.

The damages recoverable under this Act shall be limited to those which are the natural and proximate consequences of the negligent or wrongful act or omission of another.

In fixing the amount of damages to be awarded under this Act, the Court or jury shall consider all the facts and circumstances and from them fix the award at such sum as will fairly compensate for the injury resulting from the death. In determining the amount of the award, the Court or jury shall consider but is not limited to the following:

(1) Deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to the age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during his lifetime.

(2) Loss of contributions for support.

(3) Loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries.

(4) Loss of consortium.

(5) Loss of prospective training and education.

(6) Medical and funeral expenses.

The death of a beneficiary or beneficiaries before judgment shall not affect the amount of damages recoverable hereunder.

The right of action hereby granted shall not be abated by the death of a person named or to be named the defendant.

Approved March 28, 1955."

Appendix B

In the District Court of the District of Alaska
Fourth Division

No. 7524

SAMUEL SIMMONDS, Administrator of the Estate of Martha Simmons, Deceased, and for the benefit of Samuel Simmonds, and the children of the deceased, namely, Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds,

Plaintiffs,

vs.

WIEN ALASKA AIRLINES, INC.,

Defendant.

DEFENDANT'S REQUESTED INSTRUCTION NO. 1

If you find for the plaintiff and against the defendant in this action, you must then determine the amount of damages which you believe the plaintiff is entitled to recover from the defendant. The true measure of damages in such event is the pecuniary loss suffered by the estate. Such loss would be what the deceased would probably have earned by her intellectual or bodily effort of labor in her business or profession during the remainder of her life, which, to the extent

of her net savings would have gone for the benefit of her estate. In determining this amount, you should consider her age, ability, disposition to labor, and her habits of living and expenditures and disposition to save.

If the husband of the deceased paid the expenses of her last illness and funeral expenses, or has obligated himself to pay them, you shall take this into consideration in determining the amount of damages allowable.

You may not consider as an element of damages, the grief or anguish of the surviving relatives, including her husband and children, or the loss to the widower and children of the love and affection of the wife and mother and loss of the consolation of her presence in the family, or the pain and suffering of the deceased.

The amount of damages which you may allow, must not exceed the sum of $15,000.00.

See:

(1) Instruction No. 8 given by Judge Diamond in Dralle v. Steele, No. A-7101 3rd Division; note certified copy attached, and the complete file in this Court's Clerk's office, and survival therein of a widow and child.

(2) Instruction No. 8 given by Judge McCarey in Dralle v. Steele, No. A-7101 3rd Division; note certified copy attached, and the complete file in this Court's Clerk's office, and survival therein of a widow and child.

(3) *The Princess Sophia* (W.D. Wn. N. D. 1929) 35 Fed 2d 736, affirmed 9th Circuit, 1923, 61 Fed 2d 339. Survivors included spouse and children; and the District Court established the above rule as the *sole measure,* irrespective of survivors. This point not directly raised on appeal on *allowed claims,* and no indication exists in the appeal that it was raised with respect to the following part of the District Court's opinion:

> 740 "What has been said with relation to the rule of recovery forces the conclusion that under the Alaska Statute increased costs of living *to the widow,* Drowne v. Great Lakes Transit Corp. (CCA) 5 F 2 58, comfort, love, consolation, and affection to the benefit, the financial responsibility of the petitioner, equal distribution of justice, or dictates of humanity would not warrant the court in finding a pecuniary loss where none is shown by the evidence. The Court could not in good conscience say that a party 35, 40, 50 or 60 years of age, or any age, who has not shown some result of saving and saving habits and position of expectancy, in all reasonable probability, would have an estate of present worth at the end of life expectancy, health, earning capacity, and employment, contributions to charity, or 'living well', being 'a good fellow', without some evidence of accumulations and saving habit, does not create a presumption of itself to support such finding."

(4) Kreidler v. Ketchikan Spruce Mills (1st Div., 1943) 10 Alaska 365. The Court in its opinion in that case said:

> 367 "In actions brought under this section, the true measure of damages, as stated in that case,

'is the pecuniary loss suffered by the estate, without any solatium for the grief and anguish of surviving relatives or pain or suffering of the deceased; and that loss would be what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of this life, and which, as representing his net savings, would have gone for the benefit of his estate, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditures.' "

369 "We do know, however, from the allegations of the Complaint, that the deceased had a family of four children. . . ."

372 "That the damage to his estate, caused by his untimely death through the negligence of the defendant, measured by the value of deceased's life to the estate, based on his earning capacity, thriftiness, and probable length of life of the deceased, is $1,600 and that such amount shall be exclusively for *the benefit of the decedent's children,* and must be distributed by the plaintiff as if it were unbequeathed assets left in his hands after payment of all debts and expenses of administration."

(5) Chapter 89, Session Laws of Alaska, 1949.

(6) Plaintiffs' Briefs filed herein.

(7) Smith v. Pacific Alaska Airways, No. 3763, Instruction 15. Mahon v. Pacific Alaska Airways No. 3772, Instruction 15.

Respectfully submitted,
Collins & Clasby,
By /s/ Chas J. Clasby,
Attorneys for Defendant.

In the District Court for the Territory of Alaska
Third Division

No. A-7101

Vivian Dralle, Administratrix of the Estate of Herbert Dralle, deceased,
Plaintiff,
vs.
Charles Steele, doing business as Radio Cab Company,
Defendant.

INSTRUCTIONS TO THE JURY

8.

If you find for the plaintiff and against the defendant in this action you must then determine the amount of damages which you believe the plaintiff is justly entitled to recover from the defendant. The true measure of damages in such event is the pecuniary loss suffered by the estate. Such loss would be what deceased would probably have earned by his intellectual or bodily efforts of labor in his business or profession during the remainder of his life, which to the extent of his net savings would have gone for the benefit of his estate. In determining this amount you should consider his age, ability, disposition to labor, and his habits of living and expenditures, and disposition to save.

If the wife of the deceased paid the expenses of his last illness and funeral expenses or has obligated herself to pay them, you shall take this into consideration in determining the amount of damages allowable.

You may not consider as an element of damages the grief or anguish of surviving relatives, *including his wife and child* or the loss to the widow and child of the love and affection of the husband and father and loss of the consolation of his presence in the family, or the pain and suffering of the deceased.

The amount of damages which you may allow must not exceed the sum of $15,000.00.

Filed in the District Court, Territory of Alaska, Third Div., Oct. 29, 1952.

M. E. S. Brunelle, Clerk,
By Ruth Lamp, Deputy.

In the District Court of the District of Alaska
Fourth Judicial Division

United States of America)
District of Alaska) ss.
Fourth Judicial Division)

CERTIFICATE

I, John B. Hall, Clerk of the District Court of the District of Alaska, Fourth Judicial Division, do hereby certify that the foregoing and hereto attached two page(s) of typewritten matter, constitute(s) a full, true, and complete copy, and the whole thereof, of the Instructions to the Jury, No. 8, In Cause No. A-7101 entitled Vivian Dralle, Administratrix of the Estate of Herbert Dralle, deceased, Plaintiff, vs. Charles Steele, doing business as Radio Cab Company, Defendant.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled Court this 2nd day of December, 1955.

(Seal)

John B. Hall, Clerk,
By /s/ C. I. Hilgendorf,
Deputy.

In the District Court of the District of Alaska
Third Division

No. A-7101

Vivian Dralle, Administratrix of the Estate of Herbert Dralle, deceased,
Plaintiff,
vs.
Charles Steele, doing business as Radio Cab Company,
Defendant.

INSTRUCTIONS TO THE JURY

8.

If you find for the plaintiff and against the defendant in this action you must then determine the amount of damages which you believe the plaintiff is justly entitled to recover from the defendant. The true measure of damages in such event is the pecuniary loss suffered by the estate. Such loss would be what deceased would probably have earned by his intellectual or bodily efforts of labor in his business or profession during the remainder of his life, which, to the extent of his net savings would have gone for the benefit of his estate. In determining this amount you should consider his age, ability, disposition to labor, and his habits of living and expenditures, and disposition to save.

If the wife of the deceased paid the expenses of his last illness and funeral expenses or has obligated herself to pay them, you shall take this into consideration in determining the amount of damages allowable.

You may not consider as an element of damages the grief or anguish of surviving relatives, *including his wife and child* or the loss to the widow and child of the love and affection of the husband and father and loss of the consolation of his presence in the family, or the pain and suffering of the deceased.

The amount of damages which you may allow must not exceed the sum of $15,000.00.

Filed in the District Court, Territory of Alaska, Third Div., Feb. 11, 1954.

Wm. A. Hilton, Clerk,
By Ruth Lamp, Deputy.

In the District Court of the District of Alaska
Fourth Judicial Division

United States of America)
District of Alaska) ss.
Fourth Judicial Division)

CERTIFICATE

I, John B. Hall, Clerk of the District Court of the District of Alaska, Fourth Judicial Division, do hereby certify that the foregoing and hereto attached two page(s) of typewritten matter, constitute(s) a full, true, and complete copy, and the whole thereof, of the Instructions to the Jury, No. 8, In Cause No. A-7101 entitled Vivian Dralle, Administratrix of the Estate of Herbert Dralle, Deceased, Plaintiff vs. Charles Steele, doing business as Radio Cab Company, Defendant.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled Court this 2nd day of December, 1955.

John B. Hall, Clerk,
By /s/ C. I. Hilguidorf,
Deputy.

Appendix C

In the District Court for the District of Alaska
Fourth Division

No. 7524

SAMUEL SIMMONDS, Administrator of the Estate of Martha Simmons, Deceased, and for the benefit of Samuel Simmonds, and the children of the deceased, namely, Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds,
Plaintiffs,

vs.

WIEN ALASKA AIRLINES, INC.,
Defendant.

INSTRUCTIONS TO THE JURY

3. The following matters are to be considered as having been established in this action, either by stipulation of the parties or by uncontradicted testimony:

The plaintiff, Samuel Simmonds, is the duly appointed, qualified and acting administrator of the estate of Martha Simmonds. On October 10, 1951, the defendant, Wien Alaska Airlines, was a common carrier operating an airline, and on that day Martha Simmonds was a passenger for hire on one of defendant's aircraft on a flight from Meade River Coal Mine to Point Barrow. This aircraft, which was under the

exclusive control and management of the defendant, crashed near the village of Barrow, killing Martha Simmonds and the pilot, George Harrington, who was a duly licensed pilot.

Martha Simmonds is survived by her husband Samuel Simmonds, and six children, Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds.

14. If under the court's instructions you find that plaintiff is entitled to a verdict, you will award such sum as, under all the circumstances of the case, compensates the surviving husband and children of Martha Simmonds for the pecuniary loss they have suffered by reason of her death; provided, however, you may not return a verdict for plaintiff in excess of $15,000.

15. In determining that pecuniary loss, you may consider not only the financial support, if any, which the decedent's husband and children would have received except for her death, but also the pecuniary value of the society, comfort, care, protection and right to receive support, if any, which decedent's husband and children have lost by reason of the death. In weighing these matters you may consider the age of the decedent and of decedent's husband and children; the state of health and the physical condition of the decedent and of decedent's husband and children as it existed at the time of the death and immediately prior thereto; their station in life; their respective expectancies of life as shown by the evidence; the disposition of the decedent, whether it was kindly, affectionate or otherwise; whether or not she showed an

inclination to contribute to the support of her husband and children, or any of them; the earning capacity of the decedent and of her husband and children, and such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, comfort and protection, which decedent's husbands and children might have expected to receive from the decedent had she lived. With respect to the matter of life expectancies, you must keep this point in mind: If you decide for plaintiff, the prospective periods of time that will be of concern to you in determining the pecuniary loss of each beneficiary is only the shorter of the life expectancies of the decedent and that beneficiary, because manifestly one could derive pecuniary benefit from the life of the other only for the period that both would have lived.

17. The right of one person to receive support from another is not destroyed by the fact that the former does not need the support, nor by the fact that the latter has not provided it, and even if one or both of those conditions have existed, the mere right to receive support may have a pecuniary value and thus may be the basis of assessing damages against one who negligently has caused the death of the person from whom the support was due.

18. If you return a verdict for plaintiff, it shall be for a single sum, representing the aggregate of the pecuniary loss suffered by decedent's husband and children. In other words, if you return a verdict for plaintiff, you will not allocate the damages among decedent's husband and children.